

16GNGILC

Conference

1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK

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3 DAVID GILMORE,

4 Plaintiff,

New York, N.Y.

5 v.

09 Civ. 6230 (WHP)

6 ABBY GILMORE, et al.,,

7 Defendants.

8 -----x

9 June 16, 2011  
2:40 p.m.

10 Before:

11 HON. WILLIAM H. PAULEY III,

12 District Judge

13 APPEARANCES

14 ITKOWITZ & HARWOOD

15 Attorneys for Plaintiff

16 BY: JAY B. ITKOWITZ

SIMON REIFF

17 BARTON BARTON & PLOTKIN

18 Attorneys for Defendants

19 BY: MATHEW E. HOFFMAN

JESSICA MARIA JIMENEZ

1 (Case called)

2 (In open court)

3 THE COURT: Good afternoon. This is a final pretrial  
4 conference, but I have also received letters seeking permission  
5 to make various motions. Let's address the motions first.

6 Mr. Hoffman, it is a classic jury case. It is a fraud  
7 case. Certainly we are not going to put the equitable claims  
8 to the jury. I will decide those. But I can use the jury in  
9 an advisory capacity if I decide to do that. The plaintiff is  
10 entitled to a jury trial on a fraud case.

11 So what's the point of making a motion on strike the  
12 jury demand?

13 MR. HOFFMAN: Your Honor, if I may respectfully  
14 disagree with the Court. Let me pose a case to the Court.  
15 Imagine that I was about to invest, God forbid, with Bernie  
16 Madoff at the time when people were doing that, and I had given  
17 him a check. The next morning I read in the paper about all  
18 these problems, and I sought an injunction based on fraud  
19 against his cashing the check, and I came running in and sought  
20 an injunction. Since I'm hopeful that I get my injunction, I  
21 seek no other relief.

22 The gravamen of the case would be fraud, but the  
23 relief sought would have been equitable. If, for example, we  
24 eventually got a preliminary injunction and then they fought me  
25 and it was a permanent injunction request, at that point I

1 think the Court would agree with me, even though the gravamen  
2 of the case, the nature of the case was fraud, the nature of  
3 the relief would be equitable.

4 So it is our contention, your Honor and the Second  
5 Circuit has so held --

6 THE COURT: Let's talk about this case as opposed to  
7 an imaginary Madoff case.

8 MR. HOFFMAN: Yes, your Honor.

9 THE COURT: The checks were cashed in this case.

10 MR. HOFFMAN: No, your Honor. Here's the difference.  
11 What they are seeking from us is disgorgement of the money.  
12 They are not seeking some damages that they suffered that has  
13 nothing do with what we got. They are seeking the exact same  
14 relief, give us back the money and give us back all the money.

15 The important place to look here, your Honor -- you  
16 will recall that I moved to compel on the interrogatories, and  
17 the Court warned the plaintiffs that Mr. Hoffman would stand up  
18 at the pretrial and said if the relief requested is not in your  
19 interrogatories, then you are not getting it.

20 The relief they put down in their interrogatory answer  
21 shows that on the fraud case what they want are exactly the  
22 same numbers that they want in the disgorgement case.

23 So what we would argue to your Honor in a motion, and  
24 the reason I believe the motion has merit, your Honor, with all  
25 due respect to the Court's position, is that it is not whether

1 it is a fraud case that matters. It's the nature of the  
2 relief. That's what the Supreme Court held in the Gian -- I  
3 can't even say it, I apologize, your Honor, but the Supreme  
4 Court case that we cited to the Court in the letter. And that  
5 is what the Second Circuit has indicated.

6 As a matter of fact, we gave you a case, your Honor,  
7 in the letter which involved, it is a case that I think Judge  
8 Stein had and it's the BVN case. In that case, that was a  
9 contract case, the Court held that since the relief sought was  
10 equitable, that what was involved there was no jury trial.

11 Based on the holding of the Supreme Court in the case  
12 that we've cited to you, the Gianfiana Sierra (phonetic) case,  
13 the question is what relief is sought. The answer is, although  
14 they have broken it out into two in the interrogatories, it is  
15 exactly the same relief.

16 They want back the same money that they want back in  
17 disgorgement. They don't have some damages expert who is going  
18 to testify the corporation was damaged in this amount. What  
19 they are going to say is, we want the money back.

20 That is a disgorgement, that is equitable, that's what  
21 the Second Circuit has held, and that is our motion. I believe  
22 I would not be wasting the Court's time if I did not believe  
23 there was a valid basis, and if there was not case law to  
24 support it.

25 THE COURT: While they may characterize it as

1 disgorgement, that's the measure of their damages, isn't it?

2 MR. HOFFMAN: The question is really, they are  
3 saying -- they could have made a damage case, your Honor, that  
4 said we got damaged by X amount. But what they are saying is  
5 give us back the money.

6 When you say give us back the money, you are saying  
7 disgorge the money. We want restitution. Give us back what we  
8 paid -- classic equitable remedies. Therefore, not a jury  
9 case.

10 I appreciate the Court's questions, because frankly,  
11 when I first looked at this, I had all the same concerns. But  
12 when I researched it more thoroughly I began to see that the  
13 question is what's the relief. It would seem odd, your Honor,  
14 if the same relief were both equitable and nonequitable. If  
15 it's the exact same dollars in the exact same amounts, in  
16 effect, it's both equitable and nonequitable. With all due  
17 respect, your Honor, I just don't see it. They're saying give  
18 us back the money. If that's what they are saying, it's  
19 equitable. They are not saying we lost this amount because you  
20 did this bad thing to the corporation. They are saying give us  
21 back the money, disgorgement, equitable.

22 THE COURT: That would turn every breach of contract  
23 case into an equity case, right?

24 MR. HOFFMAN: No. Because normally in a breach of  
25 contract case I am not just seeking my money back, I'm seeking

1 the damages that I suffered as a result of the harm you did me.

2 I may have lost profits, I may have lost something  
3 else, but all I can tell you, your Honor, is if you look at the  
4 Design Strategies case, which was the Second Circuit, they  
5 held, if you want the money back, in effect that's  
6 disgorgement.

7 That's what they want. They want the money back, the  
8 money that they paid these people. It is disgorgement.  
9 Whether they classify it as under fraud or under contract, the  
10 Supreme Court has said that the important and deciding factor  
11 is the nature of the relief. So we believe it's a meritorious  
12 motion, your Honor. I wouldn't be standing up here wasting my  
13 client's money if I didn't.

14 THE COURT: What the about the RICO claim?

15 MR. HOFFMAN: Again, the exact same relief is sought,  
16 except this time they want to treble it, of course, your Honor,  
17 but they say give us back the money.

18 It's not that they say what you did caused us some  
19 harm that's collateral to the money that we paid you. It is  
20 give us back the money. It may be a subset, because they may  
21 be looking at less transactions, but the same claim over and  
22 over. They actually list, we paid you this on this  
23 transaction, we paid you this on this transaction, we want it  
24 back.

25 What does that mean? Disgorgement. Give us back the

1 money.

2 THE COURT: They are seeking, among other things, a  
3 judgment for money damages, aren't they, a money judgment?

4 MR. HOFFMAN: The Second Circuit has held, and the  
5 Webb case specifically states, the Southern District case of  
6 Webb specifically states that the mere fact that it's money  
7 damages does not control the issue of whether it's equitable or  
8 not.

9 What that case had is they were seeking money damages.  
10 But, your Honor, obviously every disgorgement case is a money  
11 damage case. They are saying, give me back my money. That  
12 means it's disgorgement. That means it's equitable, and the  
13 mere fact that they are saying it involves money, on that  
14 logic, your Honor, every disgorgement case would be a jury  
15 trial, and the Second Circuit and the Webb case hold that  
16 disgorgement cases are not jury trials, because a disgorgement  
17 case says give me money, and the Webb case in specific language  
18 says that it is not the monetary relief in effect that controls  
19 the issue.

20 THE COURT: All right. But that was a breach of  
21 fiduciary duty claim wasn't it?

22 MR. HOFFMAN: So is this, your Honor.

23 THE COURT: This is also a fraud claim, isn't it?

24 MR. HOFFMAN: It is a fraud-base --

25 THE COURT: The fourth claim is a fraud claim.

1 MR. HOFFMAN: But again, your Honor, the gravamen of  
2 the case, whether it's breach of fiduciary duty the Supreme  
3 Court has held is not the controlling test. The controlling  
4 test is the relief sought. It is a fraud claim in effect --

5 THE COURT: Judge Baer in the Webb case was dealing  
6 with an equitable claim, breach of fiduciary duty, and he said  
7 the fact that they are seeking damages for a breach of  
8 fiduciary duty equitable claim does not entitle them to a jury.  
9 I don't disagree with that, but this is a fraud claim.

10 MR. HOFFMAN: It is a fraud claim, your Honor,  
11 predicated in effect on a breach of fiduciary duty.

12 THE COURT: No. It's a fraud claim. There is also a  
13 breach of fiduciary duty claim. Since when is a party required  
14 to only plead one theory?

15 MR. HOFFMAN: I am not suggesting they are required to  
16 plead one theory.

17 THE COURT: So they have an independent fraud claim.

18 MR. HOFFMAN: I do not believe, your Honor, with all  
19 due respect, it is an independent fraud claim.

20 Let me explain why. Imagine that these parties had no  
21 relationship whatsoever. Then there the argument that my  
22 client had an alleged duty to disclose would not apply.

23 THE COURT: This is the second time you are asking me  
24 to imagine some other case. I don't want to do that. I want  
25 to focus on this case, where the parties know each other. They



1 are blood relatives.

2 MR. HOFFMAN: That's correct, your Honor. In this  
3 case the basis for the fraud, the alleged basis for the fraud  
4 is as the CEO my client had an alleged obligation to disclose  
5 this information. That is the basis, as I understand it, your  
6 Honor, in this case for the fraud.

7 The fraud, as I understand it, is predicated on the  
8 same breach of fiduciary duty. It's incorporated by reference.  
9 The fraud is you should have told me you were getting paid this  
10 amount of money. That's what it is about. It's about a breach  
11 of duty that is largely, if not exclusively, predicated upon  
12 the fact that she was the CEO. Therefore, it goes right back  
13 to what I have said, your Honor. So it is this case, your  
14 Honor.

15 THE COURT: Mr. Itkowitz, what do you have to say?

16 MR. ITKOWITZ: I think we have stated it in our  
17 letter, and I can't agree with your Honor more. We are  
18 entitled to a jury case.

19 Your Honor, I think a motion would be frivolous, but  
20 you know what, your Honor, frankly, there have been many  
21 frivolous positions taken by my adversary and the defendants in  
22 this matter, and when we start talking about the pretrial order  
23 we are going see it.

24 THE COURT: What is the basis for the motion addressed  
25 to the RICO claim?

1 MR. HOFFMAN: Your Honor, there are a number of bases  
2 for the motion addressed to the RICO claim. I will review just  
3 some of them.

4 THE COURT: The only thing in your letter was in a  
5 footnote about the RICO claim.

6 MR. HOFFMAN: In our reply letter, your Honor, we  
7 spelled it out in greater detail, but I did not want your  
8 Honor.

9 THE COURT: I haven't seen that.

10 MR. HOFFMAN: I had some trepidation here, your Honor.  
11 Since the Court had indicated at one point there was an issue  
12 as to whether we would be allowed to make such a motion, I  
13 didn't want to fly in the face of that to ask the Court to  
14 raise it. Let me give you some of the reasons.

15 THE COURT: Give me your best reason. Let's start  
16 with that one.

17 MR. HOFFMAN: I would say, your Honor, this is, among  
18 other things, the one I would start with, your Honor, is that  
19 it is an alleged single-victim fraud. The plaintiff is the one  
20 who allegedly got defrauded. It is a single-victim fraud, and  
21 it's a closed ended single-victim fraud because the company is  
22 no longer around. They can't be defrauding it anymore, even if  
23 these allegations are believed. And he's basing it largely on  
24 mail and wire fraud, which we have seen and the courts have  
25 held are really tenuous bases on which to base a civil RICO

1 case, and they said that the court would apply higher scrutiny.

2 So when you combine the issue, that we don't think  
3 there is a pattern, we think there is no continuity, we think  
4 it is a single-victim fraud, when you put that together, your  
5 Honor, we do believe there is a RICO motion here, and we  
6 believe it's a summary judgment RICO motion not just addressed  
7 to the pleadings. We believe it is based on what we discovered  
8 in discovery about their allegations. I don't know that I  
9 could have made it on day one, but certainly can make it now.

10 THE COURT: Do you have any case law on this  
11 proposition relating to a single victim?

12 MR. HOFFMAN: I do, your Honor. If the Court will  
13 look at Gross v. Waywell, 628 F.Supp.2d 475, which says that  
14 the Second Circuit has repeatedly -- I am skipping because it  
15 covers a number of issues. It says, Where there are a limited  
16 number of participants, a discrete scheme with a narrow purpose  
17 or single property are generally insufficient to demonstrate  
18 closed-end continuity and thus satisfy an element of RICO.

19 In the Acme American v. Katzenberg, 210 WL 3835879,  
20 the Court found no pattern of continuity where there was a  
21 closely held family business because there were limited  
22 purported participants and victims and a discrete scheme.

23 THE COURT: Who is the judge?

24 MR. HOFFMAN: That is an Eastern District case, your  
25 Honor. I am not aware of it. I can tell you in a minute. The

1 judge in Acme is Mauskopf. The judge in the Gross case is  
2 Marrero. I could provide other authorities to the Court.

3 THE COURT: Are these in this reply letter?

4 MR. HOFFMAN: No, your Honor. They are not. If the  
5 Court would like a letter on this, we would be delighted to  
6 provide one.

7 THE COURT: I am going to allow you to make a motion.

8 MR. HOFFMAN: Thank you, your Honor.

9 THE COURT: But I am also going to fix a date for  
10 trial in this case. I must tell you that I still remain  
11 unpersuaded on the motion to strike plaintiff's jury demand,  
12 but I'll let you brief it fully. Maybe you can convince me.

13 MR. HOFFMAN: Thank you, your Honor. I do appreciate  
14 that.

15 THE COURT: I'm going to tell you that Judge Baer's  
16 opinion is not going to convince me, because that is a totally  
17 different situation in which he was dealing with an equitable  
18 claim to begin with.

19 MR. HOFFMAN: I understand the Court's position, and I  
20 thank you for the guidance.

21 THE COURT: When do you want to file these motions?

22 MR. HOFFMAN: I would think that I would be prepared  
23 to file the motions, your Honor, within three weeks.

24 THE COURT: All right.

25 MR. ITKOWITZ: Your Honor?

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1 THE COURT: Yes, Mr. Itkowitz.

2 MR. ITKOWITZ: If I may be heard.

3 THE COURT: Go ahead.

4 MR. ITKOWITZ: With respect to scheduling --

5 THE COURT: Yes.

6 MR. ITKOWITZ: -- I just wanted to indicate to the  
7 Court that we have numerous motions that we would like to file  
8 to limit the scope of the testimony, the witnesses, the  
9 exhibits.

10 THE COURT: We are going to get to that.

11 MR. ITKOWITZ: OK.

12 THE COURT: Let's take things one at a time for a  
13 moment.

14 MR. ITKOWITZ: All right.

15 THE COURT: So the defendant will file their motions  
16 on July 7. Just make it one motion.

17 MR. HOFFMAN: Yes, your Honor.

18 THE COURT: Combine both branches.

19 MR. HOFFMAN: Your Honor, the only concern I would  
20 have with the limitations on the pages on RICO.

21 THE COURT: Take an extra five pages.

22 MR. HOFFMAN: Thank you, your Honor. I appreciate it.

23 THE COURT: So July 7.

24 How much time do you need to respond to these motions  
25 to strike your jury demand and for summary judgment on the RICO

1 claim?

2 MR. ITKOWITZ: I would ask for three weeks, your  
3 Honor.

4 THE COURT: OK. July 28. I'll give the defendant  
5 until August 8 to put in any reply. I'll put it down for an  
6 argument on Friday, August 19, at 10:00.

7 Now, I am going to set this matter down for trial on  
8 September 12.

9 MR. HOFFMAN: Your Honor, I just don't know how that  
10 fits with the Jewish holidays.

11 THE COURT: It's going to fit just fine, because the  
12 Jewish holidays start on -- September 28 is Rosh Hashanah.

13 MR. HOFFMAN: Thank you, your Honor.

14 THE COURT: I'm going to fix time limits in this case.  
15 I am going to give each side 20 hours to try their case. I  
16 looked at this joint pretrial order, and it's a fantasy.

17 First of all, there are multiple objections to  
18 virtually every exhibit. I assume that is just the reflex at  
19 the computer.

20 If there are any significant serious motions in limine  
21 about any exhibits or testimony, I am going to fix a briefing  
22 schedule for that. To be interposing relevance objections or  
23 authenticity, you have to raise it in a motion. Because if you  
24 think, by the way, that you are going to introduce hundreds of  
25 exhibits into evidence, then you won't have too much time for

1 any testimony in the case.

2 I think the plaintiff needs to narrow their claims and  
3 so do the defendants. You have a ridiculous number of  
4 counterclaims, but having 20 hours each to try your case,  
5 including openings and closing statements should focus your  
6 thinking.

7 I will maintain a chess clock here, and I will enforce  
8 it. If you run out of time, you rest. Because there are so  
9 many claims on both sides, I'm going to give each side 20  
10 hours.

11 By the way, the notion that anybody is going to read  
12 deposition testimony to the jury is one that should be very  
13 narrowly construed. If the witness is available, you better  
14 produce the witness, because that's what a trial is. It is not  
15 sitting droning on with a deposition transcript.

16 I permit wide-open cross-examination of any witness,  
17 which means that they are not confined to direct so that we  
18 only have to call the witness once.

19 It's only after cross-examination that I start to  
20 confine the limits of inquiry, on redirect and recross, so that  
21 we bring the testimony to a conclusion with a witness and move  
22 on to the next witness.

23 I will talk to you more about how the trial is going  
24 to unfold after we clear these motions and I see what kind of  
25 in limine motions there are.

1 But, Mr. Itkowitz, don't give me 25 in limine motions.  
2 Give me one coherent in limine motion on the stuff that is  
3 important.

4 MR. ITKOWITZ: Your Honor, may I ask you a question.  
5 They put in -- it's hard to believe, I understand -- almost  
6 2,000 exhibits which they identified.

7 THE COURT: It's ridiculous.

8 MR. ITKOWITZ: Given that situation, and it's even  
9 more ridiculous when you actually look at the exhibits, Judge,  
10 but we had to look at them.

11 THE COURT: Let me explain another rule. No exhibit  
12 will be received in evidence unless it is offered through a  
13 witness and the witness actually mentions it. So there will be  
14 no dumping of exhibits as a party is resting: "By the way,  
15 Judge, we want to offer Exhibits 1 to 1000." Because I don't  
16 send the exhibits into the jury room. The only thing that will  
17 be sent into the jury room is a list of the exhibits that were  
18 received in evidence. So if they are not mentioned, they are  
19 not going to be in the jury room to be combed through.

20 It works very well in focusing thinking in trial.  
21 There is no reason that this case has to take two or three  
22 weeks. It's a family dispute.

23 MR. HOFFMAN: Your Honor, may I be heard?

24 THE COURT: Yes. You don't think it is a family  
25 dispute?



1 MR. HOFFMAN: No, I agree with that, your Honor.

2 THE COURT: OK.

3 MR. HOFFMAN: But my issue is that there are -- let me  
4 explain my problem. On the one side, the plaintiff's case is  
5 in effect, because you didn't disclose certain things, you  
6 forfeit all your money.

7 Our contention is that Mr. Freierman, who is the one  
8 who basically did the work, did a huge amount of work. We are  
9 talking about six transactions plus another, I think, two and a  
10 half years of his work.

11 Because of the nature of the different transactions,  
12 he worked on six transactions plus he worked for two and a half  
13 years, and all that, plus the intermediate period is brought  
14 into question. The plaintiff's case, your Honor, is not hard:  
15 You didn't disclose.

16 My case, your Honor, is the justifying in effect what  
17 he did. I am concerned about whether I can provide  
18 justifications for six transactions and all those years of  
19 history in 20 hours, your Honor. I'm seriously concerned.

20 THE COURT: You have three months to think about it.

21 MR. ITKOWITZ: Judge, on that point, if I just --

22 THE COURT: You have three months to think about it.

23 MR. HOFFMAN: I am aware of that.

24 THE COURT: The most amazing thing is that if you go  
25 to a movie, you remember it 20 years later, and it was only two

1 hours in length, but it made the impression, the indelible  
2 impression that lasts with you 20 years later. The same thing  
3 is true about witnesses at a trial. So having 20 hours to  
4 present the case, it may sound like a little, but it's really a  
5 lot. It's more than three trial days for each side, and I  
6 would really like to compress it more, because often if a case  
7 takes longer than a week a jury has a problem and they get  
8 tired of hearing it.

9 MR. HOFFMAN: I appreciate that, your Honor. The  
10 other way to look at it is, if I have six transactions, plus  
11 give or take two and a half years, divide that over 20 hours,  
12 there really isn't much time to do what I have to do, if he's  
13 being asked to justify what he did for two and a half years, at  
14 least as I understand it, plus six transactions and I am  
15 concerned. I have been thinking about it, your Honor, how to  
16 streamline this, I really have, and 20 hours it seems to me,  
17 your Honor, is going to be an impossible thing to do.

18 THE COURT: It's not impossible. It's the lawyers'  
19 job to make it possible. It is not impossible at all.

20 MR. HOFFMAN: Thank you, your Honor.

21 THE COURT: Now, Mr. Itkowitz, what did you want to  
22 say?

23 MR. ITKOWITZ: I think your Honor's statements as to  
24 how the trial is going to be conducted gives us a great aid in  
25 trying to cut down the number of motions that we have to make.

1 But let me just ask you a practical question. They  
2 still at this particular time have designated almost 2000  
3 exhibits, which in truth happen to be 2800 documents. So I  
4 still need that somehow brought down. I would say at least a  
5 third are completely irrelevant. There are numerous  
6 objections, I mean to all of these exhibits.

7 THE COURT: Yes. Like relevance? Ridiculous  
8 objections like that?

9 MR. ITKOWITZ: Right.

10 THE COURT: Authenticity. Do you have that one in  
11 there, too?

12 MR. ITKOWITZ: We do.

13 THE COURT: You have generally at least about four  
14 objections for almost every exhibit, right?

15 MR. ITKOWITZ: Your Honor, I had to be defensive.

16 THE COURT: I looked at it for 15 seconds and I  
17 realized that this is a ridiculous document. You don't  
18 understand. The trial is not going to proceed that way.

19 MR. ITKOWITZ: But I was presented with 2800  
20 documents, and I had to respond to it.

21 THE COURT: Maybe the defendant is going to prune it,  
22 maybe not.

23 MR. ITKOWITZ: If he doesn't, what I am saying is  
24 that -- for instance, just one example. He identified a folder  
25 of disparate documents which consist of 50 or 100 pages, and

1 none of the documents have relevance to any other document  
2 within the folder. I mean, that's what we are talking about.

3 Can I just make a quick motion and kind of describe  
4 and let him justify how the document is relevant? Relevance is  
5 really our key objection to most of these documents.

6 He wants to put on -- we have a fraud case involving  
7 six transactions, OK, and the issue is disclosure. It's a  
8 disclosure case with respect to that particular course of  
9 action. He wants to defend by having numerous witnesses  
10 testify on what a great job they did.

11 It's completely irrelevant. They could have done a  
12 great job. It doesn't matter.

13 The nondisclosure of material subjects which should  
14 have been disclosed to siblings on the board of directors is  
15 what the case is about. It doesn't matter whether they did a  
16 good job or not. It's the nondisclosure.

17 How do we get, and the jury gets subjected to a parade  
18 of witnesses who are going to testify about what a great job  
19 they did, which they didn't, but we don't have to get into  
20 that.

21 THE COURT: Look, I'm not going to tell you what to  
22 do, but it might be sensible to pick a few bellwether exhibits  
23 and make a focused in limine motion.

24 MR. ITKOWITZ: OK. We can do that.

25 THE COURT: The rest of it will fall into place. The

1 one thing I don't want is an in limine motion on 2,000  
2 different exhibits.

3 MR. ITKOWITZ: That's fine. We've categorized it.

4 THE COURT: I know the parties are perfectly capable  
5 of doing that in this case.

6 What else?

7 MR. ITKOWITZ: We also have some dispositive motions  
8 with respect to some of the defenses and counterclaims which we  
9 had discussed the schedule with counsel, and I would pose it to  
10 the Court. I'm not sure if Mr. Hoffman agrees with our  
11 proposal, but we would propose that we submit all our motions  
12 by July 21 and that they have three weeks to respond and then  
13 one week after that.

14 MR. HOFFMAN: Your Honor, I would suggest the same  
15 schedule that we have. The reason is otherwise I'm doing two  
16 sets of motions.

17 THE COURT: Right.

18 MR. ITKOWITZ: All right.

19 THE COURT: The same schedule.

20 MR. ITKOWITZ: OK.

21 THE COURT: What motions are you going to be making,  
22 just so I know what my inbox is going to be looking like.

23 MR. ITKOWITZ: We have Daubert motions. They put  
24 witnesses who were previously undisclosed. They have defenses  
25 that they have put in to the pretrial order which weren't pled.

1 THE COURT: On the undisclosed witnesses, you have  
2 witnesses, Mr. Hoffman, that are not previously disclosed?

3 MR. HOFFMAN: Your Honor, the only witnesses that I am  
4 aware of are the ones for authenticity. They raised a question  
5 with me and said they were going to raise authenticity  
6 questions with respect to the computer, the e-mails, so we both  
7 put on our lists our e-mail people.

8 As far as I recall, your Honor, there is not another  
9 witness that is on that list that was undisclosed. There may  
10 be one lawyer whose law firm said he may not be the one, the  
11 other one is the one, because it was the same law firm.

12 So I believe that my so-called undisclosed  
13 witnesses -- the problem, your Honor, is they said none of your  
14 e-mails are going to go in, so I had to list all my IT who were  
15 going to say to the Court that it is going to come in. That is  
16 the nature, so far as I know, of the undisclosed witnesses.

17 If there are any others, this is the first time  
18 Mr. Itkowitz has raised it with me. If he raises it with me  
19 privately, we can discuss it.

20 MR. ITKOWITZ: I have 16 witnesses that he did not  
21 disclose that he identified.

22 THE COURT: Are they people that fall into the  
23 categories that Mr. Hoffman just described, that is, IT  
24 professionals or one lawyer or another at a particular firm?

25 MR. ITKOWITZ: Some are lawyers, but some of them are

1 not. I can give your Honor an analysis, but --

2 THE COURT: I know you can give me an analysis. I  
3 just want to move the case forward.

4 MR. ITKOWITZ: So do I.

5 THE COURT: Here's a simple rule. Unless you have  
6 some other huge issue to raise on one of these witnesses, no  
7 witness will be called at trial who has not been submitted for  
8 deposition.

9 MR. HOFFMAN: Your Honor, there have been very few  
10 depositions in the case.

11 THE COURT: Like I just said, if there is an  
12 undisclosed witness, you can take the undisclosed witness's  
13 deposition before trial.

14 MR. HOFFMAN: Thank you, your Honor.

15 THE COURT: That's all. It's not reopening discovery  
16 or letting people take depositions of anybody else who has  
17 previously been disclosed.

18 MR. HOFFMAN: Thank you, your Honor.

19 THE COURT: Did I hear you say that not many  
20 depositions have been taken?

21 MR. HOFFMAN: That is correct, your Honor.

22 THE COURT: OK. Well, then let me just add that it's  
23 another important reason why I'm imposing time limits on  
24 counsel during this trial. Because a trial is not an  
25 opportunity to conduct a deposition of a witness. That was all

1 supposed to happen over the last two years.

2 MR. HOFFMAN: I think, your Honor, there have been  
3 like, give or take, ten between both parties, give or take.  
4 It's not like 30 or 40. I didn't mean to suggest we hadn't  
5 done our work.

6 THE COURT: Any other issues?

7 MR. ITKOWITZ: Your Honor, under your rules, jury  
8 instructions should be put in at some point and a verdict  
9 sheet?

10 THE COURT: We'll deal with that after I hear argument  
11 or at the time I hear argument and hopefully can dispose of the  
12 motions that are going to be before me in August.

13 MR. ITKOWITZ: OK.

14 THE COURT: Then you will have time to submit a joint  
15 request to charge.

16 Anything else?

17 MR. ITKOWITZ: No, your Honor.

18 MR. HOFFMAN: No, your Honor.

19 Thank you, your Honor.

20 THE COURT: All right. Thank you for coming in.

21 Motions in limine are all on the same schedule.

22 MR. ITKOWITZ: Is there a page limit on that, on the  
23 motions in limine. We're not looking to write more than we  
24 have to write.

25 THE COURT: The motion in limine, there's no need for



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Conference

1 it to be more than 25 pages in total for any in limine motions.

2 MR. HOFFMAN: Your Honor, may I suggest at least a  
3 delay in the schedule on the motions in limine because the  
4 issue as to whether it's jury or bench trial may affect whether  
5 we do them. We would be far mor disinclined to do them if it's  
6 a bench trial than if it is a jury trial. We might not do it  
7 at all.

8 THE COURT: No, because there won't be enough time to  
9 clear that issue. So any motions in limine, make them all on  
10 the same schedule so I'll get all these motions in.

11 MR. ITKOWITZ: The motion in limine, your Honor, is  
12 separate from a dispositive motion, correct?

13 THE COURT: It certainly is in my book.

14 MR. ITKOWITZ: OK.

15 THE COURT: All right, gentlemen.

16 MR. ITKOWITZ: Thank you, your Honor.

17 MR. HOFFMAN: Thank you, your Honor.

18 THE COURT: And ladies, thank you.

19 (Adjourned)  
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